GST Direct:
Pointing the way
December 2012

Issue 15

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Seasonal vouchers

With the festive season upon us, many businesses will be buying vouchers in bulk to give to staff and customers.

Businesses purchasing vouchers should ensure they obtain a tax invoice whenever possible to enable them to recover the GST component.

2

November GST compliance obligations

Is the Christmas rush wearing you down? Fear not – you have longer than usual to file your GST return for the period ending 30 November.

This return, and any payment, is not due until 15 January 2013. The December 2012 GST return remains due as usual on 28 January 2013.

To avoid having to complete two returns in January, businesses should consider filing their November return early - especially if they will be closed for the holidays. Filing your return will also mean receiving your GST refund earlier!

You have longer than usual to file your GST return for the period ending 30 November.

3

Christchurch earthquake measures

Changes have been enacted to address the income tax treatment of damaged or destroyed assets from the Canterbury earthquake.

Many businesses have also begun to receive insurance pay-outs for affected assets.

If your business receives an insurance pay-out, there is generally a liability to pay GST on the receipt provided the underlying insurance premium was subject to GST. Some exceptions apply. Apportionment issues may also arise in relation to global insurance settlements.

There may be a GST liability even if your business is not a party to the contract of insurance. Caution must be taken to ensure GST is returned where required.

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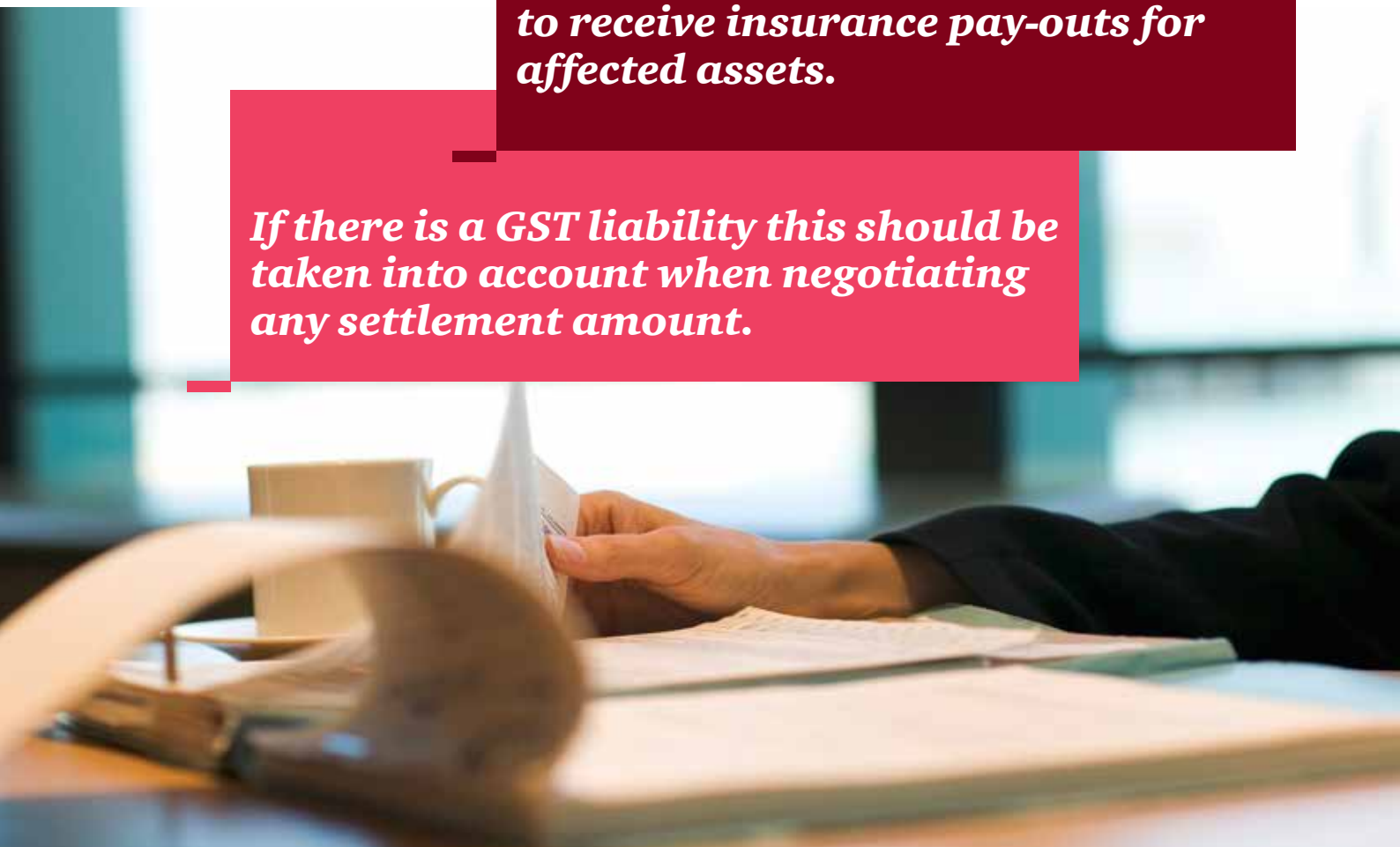

4

Qantas case – what does it mean for New Zealand?

Readers will be aware the High Court of Australia (HCA) ruled in October that Qantas must pay GST on domestic fares collected from prospective passengers who fail to turn up to take a flight and the fares are not subsequently refunded by Qantas (Commissioner of Taxation v Qantas Airways Limited [2012] HCA 41).

The HCA, by majority, found a 'supply' had been made by Qantas even though no travel actually took place. In terms of 'what' is supplied the HCA majority was prepared to say that it is not the flight itself, but some lesser right and Qantas supplied that right by promising to make a best endeavour to carry the passenger and their baggage. The HCA minority was prepared to look at the actual travel as the supply.

The Australian Tax Office (ATO) has since released a Decision Impact Statement[1] on *Qantas* maintaining that the case will not cause a significant change to the way the ATO approaches the meaning of 'supply' for GST purposes. In determining whether a supply has been made, the ATO's focus will remain on whether performance under the contract has taken place.

What does this case mean for New Zealand?

We question the applicability of the *Qantas* case to New Zealand and would venture to suggest the case would have been decided differently in New Zealand.

The Australian GST legislation defines supply in a detailed prescriptive way and this definition includes the 'creation of... a right'. New Zealand GST legislation does not define supply in the same way. At a practical level we consider only those 'rights' that are the dominant object of the transaction are intended to be covered by the Australian concept of supply of 'rights' and not any incidental (or fractional) rights. For example, the right to mine or rights associated with an option, easement, or a franchise licence.

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1. The Decision Impact Statement can be found at http://www.ato.gov.au/

New Zealand case law has traditionally given 'supply' a practical meaning and a land case specifically dismissed the notion of looking at 'rights' as the supply and instead emphasised the need to look at the actual goods or services supplied. This is further supported by Inland Revenue's Questions We've Been Asked in Tax Information Bulletin: Vol. 17, No. 4 (May 2005) dealing with the retention of a deposit by a vendor under a contract for the sale and purchase of land due to the purchaser's breach. This TIB confirmed the forfeiture of a deposit is not subject to GST as the purchaser's breach of contract is an action against the purchaser and does not result in a supply of something from the vendor to the purchaser.

Ultimately, the question goes back to what is being supplied and that there must be mutuality between the parties for GST to apply. We consider it likely that New Zealand courts would follow the Federal Court reasoning, and that of the HCA minority, namely that no supply was made by *Qantas* as no travel actually took place. This means the fares received by Qantas would not be consideration for a supply (as no travel took place).

At first blush the concern with *Qantas* was that it was establishing a broad tax on promises or rights. However, the case is not as wide as first thought because it only applies to fully performed contracts - on the HCA's analysis the contract was fully performed. The *Qantas* case did not deal with, and does not apply to, partially performed contracts, or those contracts discharged by frustration, force majeure or breach - the usual GST rules apply here.

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5

Offshore online purchases

In the September 2012 issue of GST Direct: Pointing the way, we commented on GST and duty on private imports and their relevance in light of the rapid growth of online shopping.

Since then, there has been discussion in Australia on the possibility of reducing its GST-free threshold on offshore purchases from AU$1,000 to just AU$30.

The Assistant Australian Treasurer announced on 3 December 2012 the release of the Government's interim response to the Low Value Parcel Processing Taskforce report, which was released in September. The report considers reforms to the way in which low value imported parcel processing may be undertaken in Australia, including simplification of duty and/or GST assessment and collection processes, and alternative payment methods for duty and/or GST liability.

The Australian Government recognised the current low value threshold of AU$1,000 is high by international standards and that there are in-principle grounds to reduce the threshold. However, it concluded that it would not currently be cost-effective to do so without significant improvements in the efficiency of processing low value parcels.

The Australian Government indicated it will begin preparing business cases and possible implementation plans for reforms to low value parcel processing. After relevant stakeholders are consulted, the solution set could revolve around systems that capture data better, a simplified GST assessment regime and clearance process, and possibly having the likes of Australia Post and freight forwarders responsible for collecting and remitting the revenue liability. The final report will be released in 2013.

More detail on the Australian Government's response can be found at www.treasury.gov.au.

This interesting development may further add to the debate on this side of the Tasman on the merits of reducing New Zealand's threshold which currently exempts most offshore purchases of under $400 from GST and duty.

Given that online offshore purchases by New Zealanders are estimated at $1.12 billion (and growing), there is impetus to address the GST issue in New Zealand.

A proposal to lower the threshold from AU$1,000 to just AU$30 was presented to the Australian Treasurer in December.

6

Claim for overpaid GST decided by the Supreme Court

The verdict in the Stiassny case was handed down by the Supreme Court on 28 November 2012 in favour of the Commissioner.

This is a landmark decision and is the first significant case involving a claim for restitution of overpaid taxes heard by the Supreme Court. The case also dealt with priority issues and is very important for receivers and insolvency stakeholders.

In brief, the case involved the sale of assets by receivers of 2 partners in a forestry partnership. The sale proceeds were insufficient to pay both the secured lenders and Inland Revenue. As the receivers were concerned about personal liability for the GST a payment for the GST was made to Inland Revenue under protest and the receivers then commenced a formal dispute to have the GST repaid.

In an earlier judgment in March 2012, the Court of Appeal ruled in favour of the Commissioner holding that the overpaid GST did not need to be returned even though the receivers were held to be not personally liable for the GST. The Supreme Court agreed with the Court of Appeal in a unanimous judgment delivered by Justice Blanchard.

The taxpayer receivers were seeking to demonstrate the overpaid GST can be returned because:

- Section 95 of the Personal Property Securities Act 1999 (PPSA) did not apply.
- There was a vitiating circumstance (mistake or compulsion) and it would be unconscionable for the Commissioner to retain the money given the holding the receivers were not personally liable for the GST.
- The payment of the GST was in excess of the requirements of the GST law.

The Supreme Court agreed with the Court of Appeal and a unanimous judgment was delivered.

In the June 2012 GST Direct we observed that the precise reason for the GST payment was important, as well as the capacity in which the receivers made any such payment. Indeed, this turned out to be the crucial issue to the holding. The Supreme Court held the evidence pointed to the payment having been made by, or on behalf of, the partnership and not by the receivers (of the partners) personally. If the receivers had been able to disprove this aspect then they would have succeeded in having the GST repaid. The court also held the GST paid was a debtor-initiated payment under the PPSA, and this gave the Commissioner greater priority than the secured creditors subject to the personal claim in restitution.

Even though the Supreme Court accepted the receivers had made a mistake, the Commissioner was able to successfully rebut the prima facie restitutionary claim with the defence of good consideration (ie. the payment of GST was due by the partnership). In short, there was no unjust enrichment of the Crown at the expense of the partnership (or any other party).

In a welcome development, the Supreme Court has taken the opportunity to develop the law of restitution for overpaid taxes and applicable defences in New Zealand. The right to restitution for mistaken tax payments is now established subject to applicable defences.

Another welcome development is the Supreme Court's endorsement of statutory interpretation based on the plain or ordinary meaning of words in the legislation. In response to the Commissioner's arguments about the relationship between sections 57 and 58 of the GST Act, the court did not see it appropriate of "reading into the statute something which is certainly not implicit" or to "put in additional words". We agree – it is up to Parliament to ensure the expression of the words in the legislation matches the desired policy intention. Under this approach the court confirmed the receivers were not personally liable for the GST as they were not receivers of the partnership.

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Changes to the agency rules

The Taxation (Livestock Valuation, Assets Expenditure, and Remedial Matters) Bill, introduced on 13 September 2012, includes a change that would allow principals and agents to 'opt-out' of the GST agency rules and instead each would issue a tax invoice in relation to what would be treated as two separate supplies.

Under the current rules, when an agent makes a supply to a recipient on behalf of the principal that supply is deemed to have been made by the principal and not by the agent. Only one tax invoice may be issued in relation to the main supply. The agent makes a separate supply of agency services to the principal.

The proposed rules will allow the principal and agent to 'opt-out' of the agency rules and treat a supply as two separate supplies. This means the principal and the agent will each issue a tax invoice in relation to the underlying supply.

For example, where a sales agent sells goods to a customer on behalf of the principal, the agent and principal can agree to opt-out of the agency rules so that there is a supply of goods from the principal to the agent and another supply of goods from the agent to the customer.

The general GST rules will apply to the two supplies. That is, the principal will be required to return output tax in respect of the supply to the agent, and the agent to return output tax in respect of the supply to the recipient and claim input tax in respect of the GST charged by the principal.

Principals and agents wishing to be covered by the new rule must both agree in writing. In addition, the principal must account for GST on an invoice basis only (cannot use payment or hybrid options) in relation to the supply to the agent. The bad debt rules will also be changed so that the principal cannot claim a bad debt deduction when they opt-out of the agency provisions and the agent receives payment for the supply.

The changes are to apply from the date of enactment of the legislation.

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